UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

:

v. : 16 CR. 436 (KMW)

:

STEVEN BROWN, :

Defendant. :

- x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF STEVEN BROWN'S MOTION TO ALLOW DEFENSE COUNSEL TO REVIEW GRAND JURY MINUTES OR, ALTERNATIVELY, FOR THE COURT TO CONDUCT AN *IN CAMERA* INSPECTION

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Defendant Steven Brown respectfully submits this reply memorandum of law in further support of his motion. The Government's opposition brief fails to refute what is obvious from the record: the grand jury indictment was predicated on erroneous facts and an inapplicable legal theory to fit the government's narrative that "instead of making movies" the defendants engaged in an elaborate "advanced fee scheme." This is not speculation on the part of the defense, but the actual inaccurate words used by then-U.S. Attorney Preet Bharara in a Press Release announcing the Indictment.

Accordingly, defense counsel should be permitted to review the grand jury minutes or, alternatively, the Court should conduct an *in camera* review to determine whether the grand jury acted on the inapposite "advance fee scheme" theory announced publicly by the U.S. Attorney or was otherwise grossly misled about the facts of this case.

ARGUMENT

I.

THE FACTUAL AND LEGAL INACCURACIES IN THE PRESS RELEASE CREATE A PARTICULARIZED NEED FOR REVIEW OF THE GRAND JURY MINUTES

The Government's Opposition Brief argues that the defense should be focused on "the description of the factual allegations contained in the Indictment and recited in the Press release" rather than the erroneous public statements by U.S. Attorney Preet Bharara and Assistant Director-in-Charge Diego Rodriguez. (Government Memo at 24). Those public comments, describing the defendant as someone who "rather than making movies" engaged in an "advance fee scheme" raise serious questions about the Indictment.

This should not be just another case where the USAO is permitted to violate Rule 7 of the Professional Code of Ethics and the United States Attorney's Manual, the Department of Justice's own rules and the Local Criminal Rules with no sanction of any significance or any consequence. The government should – at last – face some adverse consequences for its repeated violation of the foregoing rules in its dealings with the press.

The government distinguishes this case from *United States v Silver,* 103 F.Supp.3d 370 (S.D.N.Y. 2015), based on the fact that the negative press comments in that case were "made *after* the defendant's arrest *but prior to* the return of the indictment." (Government Memo, p. 27, fn. 18) (emphasis added). At best, this is a false and irrelevant distinction. In fact, the Press Release statements of U.S. Attorney Preet Bharara and Assistant Director-in-Charge Diego Rodriguez being issued very shortly *after* the Initial Indictment was handed down provides a window into what was actually said and presented to the grand jury. Any person reading those Press Release statements could reasonably infer that those very same inaccurate statements – coming on the heels of the indictment – were made to the grand jury. For this reason, in the instant case, the Press Release statements are far more troubling than in *Silver*.

The defense is keenly aware of *United States v. Williams*, 504 U.S. 36 (1992), but that case does not eliminate the gatekeeper functions of the District Court in every instance where factual or legal errors take place before the grand jury. *See e.g., United States v. Naegele*, 474 F.Supp.2d 9 (D.C. Cir. 2007) (ordering review of grand jury minutes where the signature page of a controlling document that served as basis for a perjury charge was allegedly not presented to the grand jury and may never have been signed); and *United States v. Twersky*, 1994 WL 319367 (S.D.N.Y. 1994) and *United States v. Bravo-Fernandez*, 239 F.Supp.3d 411, 416 (D. P.R. 2017) (reviewing sufficiency of legal instruction to grand jury where there was an intervening change of law).[1] Nor does *Williams* overturn the string of Second Circuit cases that allows a district court to supervise misconduct in front of a grand jury. *See, e.g., United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983) (dismissing indictment based on gross misconduct before grand jury); *United States v. Hill*, 1989 WL 47288 (S.D.N.Y. 1989) (dismissing counts of indictment based on repeated prosecutorial misconduct); *United States v. Vetere*, 663 F.Supp. 381 (S.D.N.Y. 1987) (factual errors undermined grand jury's independent role warranting dismissal of indictment).

Finally, the government shrugs its shoulders and argues that the statements in the Press Release were merely "allegations." But as noted by Judge Caproni in *Silver, supra*, the

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[1]The government fails in its attempt to distinguish these cases. If an "advance fee scheme" was indeed charged to the grand jury then the indictment would be founded on a flawed legal theory that merits a review of the minutes, as in *Twerky* and *Bravo-Fernandez*.

"prejudicial effect of otherwise improper comments" are not "magically dispelled by sprinkling the words 'allege(d)' or 'allegation(s)' liberally throughout the press conference or speech, or by inserting a disclaimer that the accused is "innocent unless and until proven guilty" at the end of an otherwise improper press release." 103 F. Supp.3d at 378.

II.

THE INTERESTS OF JUSTICE REQUIRE THAT THE GRAND JURY MINUTES BE REVIEWED BY THE DEFENSE OR *IN CAMERA*

The defense is at a distinct disadvantage without access to the Grand Jury minutes themselves to raise material infirmities in the charging process, which has resulted in the ongoing nightmare being faced by Mr. Brown in terms of his health, present and future livelihood, and business prospects.

It is of no solace to Mr. Brown that the Press Release is salted in inconspicuous places with the phrase "merely allegations." Certainly prospective jurors who have been exposed to the public statements about the case will not understand the meaning or significance of the legal disclaimers relied upon by the government. To those prospective jurors, Steven Brown is an advance scheme fraudster who never made any movies.

The government claims it is irrelevant if the grand jury voted an indictment grounded in factual error, and irrelevant that the so-called victims were seeking to profit in their own civil cases from Mr. Brown's criminal prosecution. It also does not matter, according to the government, that the so-called victim-government witnesses had criminal records or were admitted liars, or if a well-prepared special agent of the FBI was the primary, if not the only, witness who provided the grand jury with a pro-government version of the facts underlying law enforcement's theories of criminal culpability for Mr. Brown. According to the government, all such errors can be remedied at trial. But few criminal defendants go to trial in federal court in our nation, least of all in a complex white collar case, due to the financial and emotional stresses, the risks of trial and the projected impact of the Sentencing Guidelines. No defendant can match the vast resources of the government arrayed against him – especially in this case, where 98% of the evidence and witnesses are on the opposite coast of the trial's situs.

With respect to misconduct in front of the grand jury, the fact is neither 3500 material nor the government's interpretation of *Brady* or *Giglio* provide assurance that the defense will ever have an opportunity to push back against misconduct in front of the grand jury unless the court exercises its supervisory authority. In sum, we urge the Court to be a gatekeeper, at least to a limited degree, and to review the minutes *in camera*.

If there has been any violation of Rule 6 on the technical dictates of grand jury practice, the defense would expect the government to have an obligation under *Brady* to inform the Court and that the Court, if not the defense, would then review the grand jury minutes, at a minimum. Of course, it would be extremely unlikely that a defendant could otherwise be expected to learn of such an eventuality. In the same way, it would be almost equally unlikely through the defendant's own resources for the defense to discover the infirmities of the prosecutor's presentation to the grand jury.

The plethora of types of prosecutorial misconduct are thoroughly set forth with authorities detailed in Section 14, *et seq*. of *Grand Jury Practice* (Law Journal Press 2018).

The relevant areas of inquiry in this defense motion are as follows:

a) What were the comments of the prosecutor concerning superseding indictment and its relationship to the first grand jury's indictment?

b) Was it the same grand jury or not?

c) Did any grand juror ask questions of the government and how were they answered?

d) At any time, did the government respond to factual or legal questions?

e) At any time did the government provide legal or factual advice to the grand jurors on its own volition?

f) How were the elements of the offenses and legal principals presented to the grand jury?

g) Were any of the infirmities of the press release presented to the grand jury?

h) What percentage of the number of so-called victim witnesses or other key witnesses presented through hearsay testimony of a government agent?

i) Were any of the statements of any governmental law enforcement representative inaccurate, incomplete or untrue?

CONCLUSION

The defense asks the Court to either direct the disclosure to the defense of the government's statements to the grand jury whether it is legal instruction, response to questions or any communication with the body or its members. If the Court declines to so order, we ask the court to review such communications *in camera* to determine their accuracy, completeness and legal propriety.

Dated: New York, New York
January 26, 2018

s/

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